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Dear Ian

Te Anau advice

- 1 We refer to your instructions in which you requested advice on the Kepler and Upukerora consents for Southland District Council (**Council**). We understand that Southland Regional Council (**Environment Southland**) has given approval and direction to allow Council to undertake the design and construction of the pipeline to Kepler.
- 2 The Kepler consent authorises the discharge of treated wastewater onto land via a spray irrigation system and lapses on 22 December 2021 (**Kepler consent**). Council also currently holds a discharge permit to discharge treated wastewater to the Upukerora River from the treatment ponds (**Upukerora consent**). This consent was granted for a five year term and expires on 30 November 2020.
- 3 This letter addresses each of your questions in turn.

Kepler consent

Please provide advice as to the consenting requirements should Council resolve to implement a subsurface drip irrigation scheme as opposed to the current proposal for irrigation by centre pivot. Could this be undertaken as an amendment or variation to the current consent or would it require a new consent.

- 4 The Kepler consent as issued was for the wastewater to be sprayed onto the land. The effects of this spraying were carefully considered in the assessment of environmental effects and in evidence. Disposal of wastewater via subsurface discharge was not considered in detail as part of the application (although we note it was raised in mediation).
- 5 The Resource Management Act 1991 (**RMA**) provides for the change or cancellation of consent conditions under section 127. An application to vary a consent condition cannot be granted if, as a matter of fact and degree, the application is seeking consent to a materially different activity than what was originally granted¹. This requires an assessment of the nature or effects of the activity if the variation was approved in comparison to the original consent.

¹ *Body Corporate 970101 v Auckland CC* (2000) 6 ELRNZ 183; [2000] NZRMA 202 (HC)

- 6 Where the variation results in a fundamentally different activity, or one having materially different adverse effects, or one that seeks to expand or extend the term of the original activity, it should be treated as a new application and falls outside the scope of section 127 of the RMA².
- 7 The consent conditions³ of the Kepler consent include the following⁴:
- (a) This consent authorises the discharge of treated wastewater onto land from the Te Anau wastewater treatment plant, via a spray irrigation system, as described in the application to the north of the airport runway, onto land known as the Kepler Block and legally described as Lot 2 DP 410687 at or about map reference NZTM 2000 co-ordinates E1182670 N4944369 ("irrigation area").
- 8 We consider that subsurface irrigation is unlikely to come within the scope of a variation permitted under section 127 of the RMA. In our opinion, the subsurface discharge is likely to result in a materially different activity (i.e. subsurface irrigation rather than via spray irrigation on to land). On this basis a new consent application would in our assessment be required, rather than a variation of the existing Kepler consent. Different assessments might be required to check what the relevant effects from subsurface irrigation are likely to be. We cannot predict with certainty what Environment Southland, or potentially an independent decision maker, will decide as to whether subsurface irrigation at the Kepler Block is within the scope of the current consent.
- 9 If Environment Southland did determine that the subsurface irrigation was within the scope then the application for the variation would be treated as if it were an application for a resource consent for a discretionary activity anyway⁵. We consider at least a new assessment of key effects, such as discharge rate, and groundwater effects would be needed, regardless of whether Environment Southland would process a variation.
- 10 We note that subsurface irrigation was discussed during the mediation conducted by the Environment Court on 7 October 2016. The parties agreed that Dean and Michael were to confer with Barry Slowley on the view Environment Southland take on whether subsurface irrigation at the Kepler Block is within the scope of the current consent application. Because Environment Southland might oppose a section 127 variation for subsurface irrigation we consider that before lodging an application Council should talk with Environment Southland.

If in your opinion this could be considered through an amendment or variation please provide some advice on how this might be processed including notification process if any and requirement for a hearing.

- 11 Once a resource consent application is lodged (either a new application or a variation) with Environment Southland there is a 10 day period where the consent authority can determine whether the application is incomplete⁶. If Environment Southland considers that the consent application is complete then it will have 20 working days to determine whether to notify the application. The same notification tests apply to both a new application and a variation. In theory it is the effects, and any special circumstances that require notification, not whether the application is processed as a fresh application or a variation. We do note that if the application is processed as a variation, Environment Southland are specifically required to consider those who

² *Body Corporate 970101 v Auckland CC* (2000) 6 ELRNZ 183; [2000] NZRMA 202 (HC)

³ Appendix 4: Consent Conditions, A Discharge Permit No 302625-01

⁴ Condition 2(a)

⁵ Resource Management Act 1991, section 127(3)

⁶ Resource Management Act 1991, sections 88 and 88(3)

originally submitted and those who might be affected by the variation⁷. We consider because of the public interest in the original proposal, a variation or a new application will inevitably be publicly notified.

- 12 Environment Southland will then have 75 working days to complete the hearing if the application is publicly notified, or 45 working days if limited notified⁸.
- 13 Once a decision is made then it would be open to appeal by either Council or submitters. The appeal process can be protracted and is likely to start with mediation and if not resolved continue to a hearing. Whilst urgency can be requested at the very minimum months of time would pass before a decision is made. Decisions of the Environment Court can be appealed on points of law to the High Court (and beyond) and this is a lengthy process.
- 14 The costs of a new application or variation to the Kepler consent would be in the same order of magnitude (probably substantially reduced) to the costs for the original consent application.

Please advise how construction of additional processes for contaminant removal at the oxidation ponds might impact on either the current consent at Kepler or any potential future consent (if required) for a subsurface drip irrigation disposal route.

- 15 Improvements to the discharge, by decreasing contaminant loads, would not necessarily amount to a materially different activity requiring a new consent to operate the treatment ponds. It is always a question of degree about what changes might need a new consent. However if no new discharges are involved from the ponds, this might remain inside the scope of current approvals for the treatment ponds. At the Kepler end, provided all current requirements can still be met, i.e. volume, load, etc., then extra processing in isolation should not affect the current Kepler consent.
- 16 As discussed above, whether a variation can occur depends on whether the variation will result in a materially different activity or one having materially different adverse effects. If the contaminant load was reduced but the discharge remained within all of the current Kepler consent parameters then that change could in all likelihood be carried out without the need for a new consent.
- 17 Generally any decrease in contaminant load should make consenting (for either the consented method or subsurface drip) easier if adverse environmental effects are reduced. Any increase in discharge rate would need to be properly assessed and modelled to reach a conclusion about any change in effects. Improvements to the quality do not, however, always appease those opposed to a project who are inclined to object regardless of the environmental effect.

Upukerora consent

Please provide further advice around issues associated with obtaining a further short term consent for continuing to discharge to the Upukerora River. This should include, likely processing route and need for a hearing.

- 18 Section 127(1)(b) of the RMA provides for the change or cancellation of consent conditions on application by consent holder but does not allow for an increase in the term of a consent. Any "extension" to the current consent (i.e. duration of the consent) would need to be via a new application and not merely a change to the existing consent condition.
- 19 The existing Upukerora consent expires 30 November 2020 and the lapse date of the Kepler consent is 22 December 2021.

⁷ Resource Management Act 1991, section 127

⁸ Resource Management Act 1991, section 103A

- 20 The normal consent application process would apply to an application for the extension of the Upukerora consent. A non-complying activity requires one of the section 104D RMA gateways to be met being that either the activity is not contrary to the objectives and policies or the effects will be minor. Because the activity is already inconsistent with the operative plan's objectives and policies this gateway cannot be passed. We note that the decisions version of the proposed Southland Water and Land Plan (**pSWLP**) is more balanced than the current operative plan. If the pSWLP remains in its current form then, once it is operative⁹, there is a reasonable likelihood that this gateway will be passed.
- 21 While the current operative plan remains any application would have to meet the effects gateway and demonstrate that "*the adverse effects of the activity on the environment... will be minor*"¹⁰. If neither gateway can be met the non-complying activity application must fail.
- 22 The other consideration currently unresolved is whether the Councils might appeal the activity status of discharges to water, and if successful change this to a discretionary activity. Should that be successful, then the non-complying gateway test would not apply to a new application for consent to discharge into the Upukerora River.
- 23 Section 95A of the RMA provides that public notification can be required if Environment Southland (being the "consent authority") decides, that the activity will have or is likely to have, adverse effects on the environment that are more than minor¹¹. We understand from our letter dated 13 February 2017 that the adverse effects on the environment have previously been assessed to be minor, and that there would be a slight reduction in water quality, particularly due to *E.coli*. While Environment Southland could potentially avoid public notification, we consider they would at least require a limited notified process to involve key stakeholders. Only with the written approvals of key stakeholders is non-notification a realistic option. Council ought to consult those stakeholders early if this process is to be embarked on.
- 24 If the application was notified then a hearing is required if any submitter requests a hearing. Environment Southland's decision can be appealed to the Environment Court and this process can take approximately a year (noting that priority can be applied for).

Please provide an assessment of the probability of a consent being granted and likely duration following the most recent changes to the National Policy Statement for Freshwater Management 2014 (Amended 2017) around contact recreation.

- 25 The National Policy Statement for Freshwater Management 2014 (Amended 2017) (**NPSFM (Amended 2017)**) came into force on 6 September 2017. The 2017 amendments aim to improve the quantity and quality of fresh water over time so that specified lakes and rivers in New Zealand are suitable for primary contact by 2040.
- 26 "Primary contact" is defined in the NPSFM (Amended 2017) as follows¹²:

"Primary contact" means people's contact with fresh water that involves immersion in water, including swimming.

⁹ The section 104D(1)(b) gateway requires the application to not be contrary to both the operative and proposed plan. Therefore the existing operative plan is relevant until the appeals on the pSWLP are settled.

¹⁰ Resource Management Act 1991, section 104D(1)(a)

¹¹ Resource Management Act 1991, section 95D

¹² National Policy Statement for Freshwater Management (Amended 2017), 6 September 2017, page 9

27 We also note that "primary contact site" is defined as¹³:

"Primary contact site" means:

- a) any part of a specified river or lake that a regional council considers is used, or would be used but for existing freshwater quality, for primary contact; and
- b) any other site in any other river or lake that a regional council has determined should be managed for primary contact.

28 "Specified rivers" is defined as follows¹⁴:

"Specified rivers and lakes" means:

- a) rivers that are fourth order or above using the methods outlined in the River Environment Classification system, National Institute of Water and Atmospheric Research, Version 1...

29 And "suitable for primary contact more often"¹⁵:

"Suitable for primary contact more often" means reducing the percentage and magnitude of E. coli exceedences for rivers and lakes, and cyanobacteria - planktonic biovolume for lakes, according to the attribute tables in Appendix 2.

30 In light of the NPSFM (Amended 2017) Environment Southland will still be required to establish a freshwater management unit (**FMU**) for the Upukerora River. A FMU is defined by the NPSFM (Amended 2017) as follows¹⁶:

"Freshwater management unit" is the water body, multiple water bodies or any part of a water body determined by the regional council as the appropriate spatial scale for setting freshwater objectives and limits and for freshwater accounting and management purposes.

31 Environment Southland will need to set a defined timeframe and method in its plan to make the water in specified rivers suitable for primary contact more often. This may include more stringent rules around discharge consents in the Upukerora River. The proposed Southland Water and Land Plan (**pSWLP**), which has not been amended to provide for the objectives and policies regarding primary contact in the NPSFM (Amended 2017), includes the Upukerora River as part of the Waiau FMU¹⁷. The pSWLP intends to apply a FMU limit setting process whereby objectives, policies and rules will be developed for each FMU. We note that the pSWLP states that "*Environment Southland intends to complete its FMU limit setting programme by December 2025*"¹⁸. In regards to FMU's the pSWLP provides the following region-wide objective¹⁹:

¹³ Page 9

¹⁴ Page 9

¹⁵ Page 9

¹⁶ National Policy Statement for Freshwater Management (Amended 2017), 6 September 2017, page 8

¹⁷ Proposed Southland Water and Land Plan, Map Series 7, Freshwater Management Units, Map 1

¹⁸ Proposed Southland Water and Land Plan, page 7

¹⁹ Proposed Southland Water and Land Plan, page 22

Objective 7

Any further over-allocation of freshwater (water quality and quantity) is avoided and existing over-allocation is phased out in accordance with timeframes established under Freshwater Management Unit processes.

- 32 We note that the operative Regional Water Plan for Southland (**RWP**) already includes objectives and policies that are inconsistent with the Upukerora consent discharge yet the original consent was granted.
- 33 In light of the NPSFM (Amended 2017) and the pSWLP we consider that Environment Southland may well recommend that an application for discharge be declined because it is contrary to the objectives and policies of the policy statement, operative plan and proposed plan. If consent were granted then conditions may be imposed to ensure the 2025 FMU limit setting programme and NPSFM (Amended 2017) are achieved. The aim of the NPSFM (Amended 2017) is to improve water quality across all categories. This is achieved by setting national targets to increase proportions of specified rivers and lakes that are suitable for primary contact more often to at least 80% by 2030 and 90% no later than 2040. The *E. coli* attribute table is attached at **Appendix 2** to this letter.
- 34 We consider that a short term extension of the existing consent is still possible even with the changes to the NPSFM (Amended 2017), particularly if the extension was for a term up until 22 December 2021. However, it is likely to be more difficult to obtain than last time and is likely to have more onerous conditions requiring an upgrade to the discharge quality. We note that in our letter dated 13 February 2017 we considered that Environment Southland staff would oppose an extension. While staff opposition does not make obtaining consent impossible it does make it more difficult.
- 35 We remain of the view that a new consent (extension) beyond December 2021 is a low chance while Council has a viable and consented land based alternative discharge option (at Kepler). If, however, subsurface discharge was significantly better than the current consented discharge then this may increase the chance of an extension if more time is again needed to consent a subsurface option prior to lapse of the Upukerora consent. As addressed in our previous letter, the Upukerora consent without upgrades (even for an additional one year) is contrary to the objectives and policies of the operative RWP.
- 36 Please call to discuss any of these issues.

Yours faithfully
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Appendix 1: New water quality objectives and policies in the National Policy Statement for Freshwater Management 2014 (Amended 2017)

Objective A3

The quality of fresh water within a freshwater management unit is improved so it is suitable for primary contact more often, unless:

- a) regional targets established under Policy A6(b) have been achieved; or
- b) naturally occurring processes mean further improvement is not possible.

Policy A5

By every regional council making or changing regional plans to the extent needed to ensure the plans:

- a) identify specified rivers and lakes, and primary contact sites; and
- b) state what improvements will be made, and over what timeframes, to specified rivers and lakes, and primary contact sites, so they are suitable for primary contact more often; or
- c) state how specified rivers and lakes, and primary contact sites, will be maintained if regional targets established under Policy A6(b) have been achieved.

Improvements to specified rivers and lakes in (b) must make a contribution to achieving regional targets established under Policy A6(b).

Policy A6

By every regional council developing regional targets to improve the quality of fresh water in specified rivers and lakes and contribute to achieving the national target in Appendix 6, and ensuring:

- a) draft regional targets are available to the public by 31 March 2018; and
- b) final regional targets are available to the public by 31 December 2018.

Appendix 2: Attribute table for Human health for recreation in the National Policy Statement for Freshwater Management 2014 (Amended 2017)

Value	Human health for recreation				
Freshwater Body Type	Lakes and rivers				
Attribute	<i>Escherichia coli</i> (<i>E. coli</i>)				
Attribute Unit	<i>E. coli</i> /100 mL (number of <i>E. coli</i> per hundred millilitres)				
Attribute State^{1,2}	Numeric Attribute State				Narrative Attribute State
	% exceedances over 540 cfu/100 mL	% exceedances over 260 cfu/100 mL	Median concentration (cfu/100 mL)	95th percentile of <i>E. coli</i> /100 mL	Description of risk of Campylobacter infection (based on <i>E. coli</i> indicator)
A (Blue)	<5%	<20%	≤130	≤540	For at least half the time, the estimated risk is <1 in 1000 (0.1% risk) The predicted average infection risk is 1%*
B (Green)	5-10%	20-30%	≤130	≤1000	For at least half the time, the estimated risk is <1 in 1000 (0.1% risk) The predicted average infection risk is 2%*
C (Yellow)	10-20%	20-34%	≤130	≤1200	For at least half the time, the estimated risk is <1 in 1000 (0.1% risk) The predicted average infection risk is 3%*
D (Orange)	20-30%	>34%	>130	>1200	20-30% of the time the estimated risk is ≥50 in 1000 (>5% risk) The predicted average infection risk is >3%*

E (Red)	>30%	>50%	>260	>1200	For more than 30% of the time the estimated risk is ≥ 50 in 1000 (>5% risk) The predicted average infection risk is >7%*
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* The predicted average infection risk is the overall average infection to swimmers based on a random exposure on a random day, ignoring any possibility of not swimming during high flows or when a surveillance advisory is in place (assuming that the *E. coli* concentration follows a lognormal distribution). Actual risk will generally be less if a person does not swim during high flows.

¹ Attribute state should be determined by using a minimum of 60 samples over a maximum of 5 years, collected on a regular basis regardless of weather and flow conditions. However, where a sample has been missed due to adverse weather or error, attribute state may be determined using samples over a longer timeframe.

² Attribute state must be determined by satisfying all numeric attribute states.